

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAPOLEON ANDERSON, a/k/a DARNELL
ANDERSON, DARNELL WILLIAMS,
DARNELL EDWARD ANDERSON,
NAPOLEON RICHARDS, RAYMOND GUY and
RICHARD NAPOLEON,

Defendant-Appellant.

UNPUBLISHED

April 25, 2006

No. 259298

Oakland Circuit Court

LC No. 03-192863-FH

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for uttering and publishing, MCL 750.249, and obtaining personal identification without authorization, former MCL 750.285. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 46 months to 20 year's imprisonment for each offense. We affirm in part, vacate in part, and remand.

Defendant's first issue on appeal is that the trial court erred in denying his motion to dismiss for lack of speedy trial. Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. This Court reviews the trial court's factual findings under the clearly erroneous standard and reviews constitutional questions of law de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Persons charged with crimes are entitled to a speedy trial and determination of all prosecutions. MCL 768.1. In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to defendant from the delay. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). The fourth element, prejudice, is critical to the analysis. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999).

This Court must first consider the length of the delay. Defendant was arrested on September 23, 2003, and his trial began on August 5, 2004. A delay of six months is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v*

Ross, 145 Mich App 483, 491-492; 378 NW2d 517 (1985). A delay of 18 months or more is presumed prejudicial and places a burden on the prosecutor to rebut that presumption. *Cain*, *supra* at 112. In this case, the delay was ten months and 13 days, long enough to trigger the investigation into defendant's claim but not long enough to shift the burden of proving lack of prejudice to the prosecution.

In assessing the reasons for the delay, each period of delay is examined and attributed to the prosecutor or the defendant. *Ross*, *supra* at 491. Unexplained delays are attributed to the prosecutor. *People v Patterson*, 170 Mich App 162, 167; 427 NW2d 601 (1988). Scheduling delays and delays caused by the court system are also attributed to the prosecutor, but should be given a neutral tint and only minimal weight. *Gilmore*, *supra* at 460. Delays caused by the adjudication of defense motions are attributable to the defendant. *Gilmore*, *supra* at 460. The time between dismissal and reinstatement of a charge is not counted against either party. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993).

In this case, the record only reveals two reasons for some of the delay in the start of the trial. First, on December 18, 2003, defendant pleaded guilty to uttering and publishing, a plea that was later withdrawn on January 26, 2004. It was defendant who initiated the plea agreement pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), and who pleaded guilty. The time period involving defendant's plea and withdrawal should be attributed to defendant because he initiated the proceedings and briefly accepted the plea in lieu of proceeding to trial. That time is analogous to the time spent adjudicating a defendant's motions and we conclude that it should count against defendant.

The second reason for the delay found in the record was discussed at the hearing for the motion for speedy trial. At that hearing on July 14, 2004, the trial court indicated that the next available trial date was August 5, 2004, which was already the date of defendant's trial. That scheduling delay caused by the court system is attributed to the prosecutor, but should be given a neutral tint and only minimal weight.

This Court must also look at the assertion of the right. Defendant first asserted his right to a speedy trial in his motion for speedy trial, dismissal, and credit for served, which was filed on July 1, 2004. Thus, defendant did not assert his right to a speedy trial until over nine months after his arrest and a little more than one month prior to his trial. Failure to promptly assert the right to a speedy trial does not preclude a speedy trial claim, but it is one of the factors to be balanced. *Ross*, *supra* at 491.

This Court would also have to examine whether defendant was prejudiced by the delay. A defendant can experience two types of prejudice while awaiting trial. Prejudice to the person results when pretrial incarceration deprives an accused of many civil liberties, while prejudice to the defense occurs when the defense might be prejudiced by the delay. *Gilmore*, *supra* at 461-462. Defendant argues on appeal that he suffered prejudice to his person because none of the time he spent in jail awaiting trial will be credited to his sentences in this case. While defendant is correct that he will not receive jail credit against the sentences imposed in this case, he will receive credit for the time. A parole detainee who is convicted of a new criminal offense is entitled to credit time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. *People v Seiders*, 262 Mich App 702, 686; 513

NW2d 821 (2004). Defendant is going to receive jail credit for his time and we conclude that he was not prejudiced by the delay.

Looking at all of the factors, we conclude that the trial court did not err in denying defendant's motion for a speedy trial. The delay was not that long and part of the delay is attributable to defendant or given minimal weight. Defendant was not timely in bringing his motion and he did not suffer any prejudice.

Defendant's second issue on appeal is that insufficient evidence was presented to support his conviction for uttering and publishing, and that the trial court erred in denying his motion for a directed verdict. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, in a light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). In reviewing the sufficiency of the evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The elements of uttering and publishing are: (1) defendant's knowledge that the instrument was false, (2) an intent to defraud, and (3) presenting the forged instrument for payment. *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003). In this case, both parties agree on appeal that the third element of uttering and publishing is not present. While defendant presented a false instrument to the teller, the withdrawal slip, he did not present it for payment. The false instrument was only used to provide an account number. Therefore we are forced to agree with the arguments of both parties in this case that a rational trier of fact could not have found that all elements of the crime of uttering and publishing were proven beyond a reasonable doubt.

While the prosecution agrees that defendant is not guilty of uttering and publishing, it argues on appeal that the evidence does show that defendant is guilty of attempted uttering and publishing and that the case should be remanded for entry of a conviction of that offense. An attempt is a cognate offense, *People v Adams*, 416 Mich 53, 57; 330 NW2d 634 (1982), and it is a separate, substantive offense punishable under its own statute. *People v Johnson*, 195 Mich App 571, 575; 491 NW2d 622 (1992). The jury could have found defendant not guilty of the offense of uttering and publishing while convicting him of attempted uttering and publishing below. MCL 768.32(1).

Sufficient evidence was presented to support a conviction for attempted uttering and publishing. In order to be convicted of attempted uttering and publishing, the prosecution must prove that a defendant specifically intended to commit uttering and publishing and took some action in furtherance of that specific intent. *People v Burton*, 252 Mich App 130, 141; 651 NW2d 143 (2002). An action in furtherance of the alleged crime must be unequivocal and more than just mere preparation to commit the crime. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). In this case, defendant attempted to withdraw money from a checking account that did not belong to him. He presented two fake forms of identification claiming he was the victim

and a forged withdrawal slip that listed the victim's account number. If the account had not been flagged, defendant would have signed a new withdrawal slip and completed the uttering and publishing. From the evidence presented, we conclude that sufficient evidence was presented to show that defendant had the specific intent to commit uttering and publishing and took an action in furtherance of that intent.

Furthermore, the jury's verdict must have included a specific finding that defendant intended to commit uttering and publishing. The jury convicted defendant of uttering and publishing and the elements of that crime include knowledge that the instrument was false and intent to defraud. The jury's verdict indicates that it found defendant intended to defraud through the use of a false instrument and we conclude that the jury's finding must have included a specific finding that defendant intended to commit uttering and publishing.

The jury's verdict must have also included a specific finding that defendant took some act in furtherance of his intent to commit uttering and publishing. The jury found that defendant committed uttering and publishing, which indicates that it found he had given fake identification and the victim's account number to the teller. Either of those actions would qualify as an action in furtherance of defendant's intent to commit uttering and publishing and we conclude that the jury's verdict must have included a specific finding that defendant took some action in furtherance of his intent to commit uttering and publishing.

Defendant's conviction for obtaining personal identification without authorization is affirmed, but the conviction for uttering and publishing is vacated. We remand for entry of a conviction of attempted uttering and publishing and for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello